



Commonwealth of Massachusetts  
Executive Office of Environmental Affairs

## Department of Environmental Protection

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JUN 23 1996

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### The Revised 401 Water Quality Certification Program: Some Questions Answered

As part of an ongoing effort to streamline its permitting programs while enhancing environmental protection, the Department of Environmental Protection (DEP) is consolidating its two wetlands regulatory programs: 401 Water Quality Certifications (issued pursuant to the federal Clean Water Act) and the Wetlands Protection Program (implementing the Massachusetts Wetlands Protection Act). This program change will take effect on October 1, 1992. The following are some commonly-asked questions about this program change with answers from DEP. The questions and answers have been organized into categories:

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- Procedures Under the Revised 401 Program, page 6.

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#### General 401 Information

1. What is the 401 Water Quality Certification Program or "401"?

"401" refers to a section of the federal Clean Water Act. The section requires an applicant for a federal permit for a discharge to waters to obtain a certification from the state that the proposed activity will maintain water quality standards and comply with other appropriate requirements of state law. The regulations for the water quality certification program were promulgated in 1978.

2. What federal permits require 401 certification?

Generally, 401 certification is required under Section 404 of the Clean Water Act, Sections 9 and 10 of the Rivers and Harbors Act, and licenses granted by the Federal Energy Regulatory Commission (FERC). Nationwide permits issued by the Corps of Engineers under Section 404 for dredge and fill projects also are

subject to state water quality certification under 401. Wetlands alterations generally are subject to Section 404 permits issued by the Corps for dredge and fill projects.

3. What activities are covered?

If a project needs a federal permit, any activity on the site which could discharge pollutants or violate water quality standards is subject to 401 certification.

Types of activities include, but are not limited to: placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities.

4. What is the standard that a project must meet to receive a 401 certification?

Under the regulations found at 314 Code of Massachusetts Regulations (CMR) 9.00, DEP must certify that there is reasonable assurance that the activity will not violate water quality standards. DEP may impose conditions necessary to maintain water quality, minimize damage to the environment, and promote compliance with other applicable provisions of state law.

### **Water Quality Standards & Outstanding Resource Waters**

5. What are Water Quality Standards?

Water Quality Standards are established by each state, and specify classes of water bodies, existing uses, and the minimum criteria which discharges must meet. These requirements are adopted as regulations and revised periodically.



6. Do the Massachusetts Surface Water Quality Standards apply to wetlands?

Wetlands are surface waters of the Commonwealth, and therefore the standards apply. The antidegradation provisions of the water quality standards provide the principal means of protection for wetlands.

7. What are antidegradation provisions?

The antidegradation provisions protect existing uses of waters and prevent or limit the lowering of water quality. Existing uses of wetlands include all actual uses such as wildlife and aquatic ecosystem habitat. Most wetlands are designated as "high quality" waters; existing uses must be protected and any degradation is prohibited. Wetlands bordering public water supplies and their tributaries, and other significant resources including vernal pools and many Areas of Critical Environmental Concern, are designated as Outstanding Resource Waters. Discharges to these wetlands are prohibited except in very limited circumstances.

8. What are Outstanding Resource Waters and how are they identified?

Outstanding Resource Waters (ORWs) is the designation in the Massachusetts Surface Water Quality Standards for waters with exceptional characteristics, including socioeconomic, recreational, ecological and/or aesthetic values. Because of the significance of these waters, they are given the highest degree of protection.

ORWs are identified in the tables found at 314 CMR 4.06 in the "Other Restrictions" column. The tables identifying ORWs indicate that all tributaries upstream of the public surface water supply carry the same designation. The designation also includes wetlands bordering all tributaries and reservoirs. Other waters may be proposed for designation and incorporated in the regulations during DEP's revision of the Surface Water Quality Standards. This regulatory revision is a public process.

9. Are there exemptions to the prohibition on discharges in ORWs?

DEP has identified exemptions which are consistent with

the provisions of the Cohen bill (Watershed Protection Act, M.G.L. c.92, §107), the legislation recently enacted to protect the watersheds of the Quabbin and Wachusett reservoirs.

### The 401 Program Change

10. Where will non-wetland 401 reviews, such as for FERC and dredging projects, be reviewed?

401 review of non-wetland projects will continue to be performed by the Division of Water Pollution Control in DEP's Boston office. Applicants proposing dredging work or utilities seeking certification of FERC licenses should send materials to DWPC in Boston.

11. Who will issue water quality certifications for those projects that require a 402 Massachusetts/National Pollutant Discharge Elimination System (MA/NPDES) permit for point source discharges to surface waters?

Those certifications, typically for industrial and commercial outfall pipes, will be issued with the MA/NPDES permit from the DWPC Grafton office, as part of the permit issuance process where DWPC determines the water quality based effluent limitations.

12. Why does the state have two wetlands programs?

DEP has two programs -- 401 and the Wetlands Protection Act -- because they arose under different legal mandates, one federal and one state. The Wetlands Protection Act focuses on land near or under water bodies and wetlands; the Clean Water Act focuses on the water itself. Legally, there is no relationship between these two laws, with the exception of the authority under the federal act to apply state law as 401 conditions. This effort is an attempt to streamline the two programs.

13. Are the criteria for a 401 certification different from the performance standards under the Wetlands Protection Act?

The criteria for 401 review are different than the Wetlands Protection Act performance standards because they have evolved from separate sources. The 401 program has been influenced by programs of the federal and state Clean Water Acts.



At the federal level, EPA's approach to wetlands under the Clean Water Act is to seek first to avoid adverse impacts, then minimize any unavoidable impacts, and then to mitigate any remaining impacts. The state Wetlands Protection Act regulations are based on performance standards for specific resource areas.

14. What is the role of the conservation commission in the 401 program?

A 401 certification is a state permit and therefore is issued by DEP. Conservation commissions have no regulatory role in 401 review, although they are encouraged to comment to DEP during the public review period concerning the project's compliance with state water quality standards. For most projects resulting in the loss of up to 5,000 square feet of wetlands, DEP will rely on the local order of conditions in lieu of a separate state review. For the convenience of applicants, DEP suggests that public notice of 401 review by the Department and the hearing on a submitted Notice of Intent be published jointly. DEP has provided suggested language for this joint notice. Although 401 criteria should not be applied by conservation commissions, applicants are encouraged to design their projects to meet both the Wetlands Protection Act and 401 standards.

### **Jurisdiction**

15. What types of wetlands are covered by the 401 program?

The 401 program concentrates on dredging and fill projects in inland and coastal vegetated wetlands, including isolated wetlands, and waters of the Commonwealth.

16. Are wetlands or resource areas subject to jurisdiction the same under the 401 program and the Wetlands Protection Act?

No. Banks, floodplains, beaches, dunes, and other "dry" resource areas including the buffer zone, regulated under the Wetlands Protection Act, generally are not subject to federal permit requirements and therefore do not need 401 certification.

17. Are the boundaries of vegetated wetlands the same under 401 and the Wetlands Protection Act?

The methods of wetlands delineation differ under federal and state law, but the boundaries are generally equivalent. Because these methods yield substantially similar boundaries, DEP will allow applicants to use the state boundary for both the Order of Conditions and 401 certification for bordering vegetated wetlands. Applicants proposing alterations of isolated wetlands should use the Federal Method described in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands for boundary delineation. The Corps of Engineers is responsible for making boundary determinations under 404.

18. Do projects that require a Chapter 91 waterways license also require a 401 certification?

A Chapter 91 license is a state, not a federal, permit and therefore does not trigger 401 jurisdiction. However, many projects which need a Chapter 91 license are also subject to permitting under Sections 9 and 10 of the federal Rivers and Harbors Act or Section 404 of the Clean Water Act, and those projects would require a 401 certification.

#### **Procedures Under the Revised 401 Program**

19. How is 401 review conducted in connection with the Wetlands Protection Act permitting process?

Applicants may submit their 401 application simultaneously with their Notice of Intent under the WPA or any time afterwards. Although 401 certification generally will not be issued until the project has received an Order of Conditions, applicants are encouraged to make timely filings of their 401 applications and to design their projects to meet 401 criteria.

For most projects which result in the loss of up to 5,000 sq. ft. of vegetated wetland or land under water, the Order of Conditions issued by the local conservation commission will constitute the 401 certification unless it is appealed to DEP within the 10-day appeal period. Maximum review times for large projects vary from 120 days for minor projects to 150



days for major projects, assuming there are no application deficiencies; actual review times may be shorter.

20. Will all projects involving wetlands need a 401 certification review?

Under the revised program, DEP has determined that projects which result in the loss of up to 5,000 sq. ft. of vegetated wetlands or land under water (and are not in ORWs or salt marsh, involve subdivisions, or are exempt from the WPA) will be subject to conditions under the Wetlands Protection Act which are sufficient to protect water quality. Additional review under 401 therefore would burden applicants without yielding significant environmental benefits. Projects approved by the local conservation commission -- or DEP on appeal -- will not need further state review under 401.

21. Are limited projects under the Wetlands Protection Act subject to 401 review?

Because the federal Clean Water Act does not have special standards for limited projects -- similar to those found in the Wetlands Protection Act regulations -- all limited projects proposing more than 5,000 sq. ft. of fill or in an ORW or salt marsh require 401 review.

22. Are projects exempt under the Wetlands Protection Act subject to 401 review?

Many projects that the state legislature exempted from the Wetlands Protection Act are still subject to the state and federal Clean Water(s) Acts. DEP has always reviewed these projects under 401, although they remain exempt from local review by the conservation commission.

23. Are agricultural projects exempt?

Agricultural projects which are exempt from the federal permitting requirements of Section 404 (f) of the federal Clean Water Act are also exempt under 401. The Wetlands Protection Act also contains an exemption for some agricultural projects. DEP is in the process of revising regulations concerning exempt agricultural activities through the Farmlands Advisory Committee. DEP anticipates that exempt agricultural activities will be treated the same under both programs.

24. Will there be special information requirements imposed on subdivisions under 401 review?

Under 401 review DEP will require information from the applicant on anticipated subsequent fill in wetlands in subdivisions on full "build-out". DEP will gather this information to determine the magnitude of wetlands loss resulting from subdivisions and may exercise this authority during regulation development in cases where cumulative impacts are especially significant.

25. Will DEP require an alternatives analysis under 401?

In its 401 review, DEP must ensure that "no less environmentally damaging alternative site for the activity is reasonably available or feasible." The applicant is required to present alternatives to the project proposal and demonstrate to the Department that the proposal will result in the least environmental harm as compared to other alternatives which are reasonably attainable or practicable. The requirement that alternatives be reasonable asks the Department to balance the impact on the environment and the impact on the applicant.

26. What if alternatives cost too much and the applicant cannot afford any other proposal?

Cost to the applicant is a factor in the analysis. But cost must be weighed against the environmental harm from the alternatives. The scope of the alternatives analysis will be commensurate with the scale of the proposed project.

27. Are there still "generic certifications"?

"Generic certifications" were used by the Division of Water Pollution to allow applicants proposing minor projects to proceed according to general conditions. The categories of generic certification have been replaced in the Interim Guidance by the provision which allows most projects which result in the loss of up to 5,000 sq. ft. with an Order of Conditions to proceed without individual 401 review.



28. After October 1, 1992, will all 401 applications for wetlands fill projects be evaluated using the new Interim Guidance, including those applications submitted to DWPC prior to that date?

All 401 wetlands applications reviewed by DEP staff after October 1 will be evaluated using the revised Interim Guidance. Applications received before October 1 will be reviewed under prior guidance provided by the Division of Water Pollution Control.

401 applications proposing wetlands fill that are received in the Boston office after October 1 will be routed to the appropriate regional office for review during the transition period.

29. Will there be any change in fees under this revised program?

None of the fees are being raised by the re-design of the 401 water quality certification program. Fees for smaller projects, however, may be lowered or eliminated.

